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Constitutional adjudication and the individual — a post-socialist solution

The aim of this contribution is to show the physiology (and hopefully not the pathology) of a constitutional problem at a certain stage of post socialist constitutional development. I emphasize that although we jurists talk about laws and interpretative rules, the most important element of constitutionalism is the constitutional mind — to put it so, — the attitude of the society and first of all of the decision makers towards constitutionalism. The paper first provides some information about essential changes in the Hungarian constitutional system concerning the individual's procedural rights to the enforcement of their fundamental rights. Related to these procedural changes of 2012, the second part sheds light to a joint substancial issue, namely how this new system is capable to influence the scope of rights protection in individual's private matters.

1. The Hungarian Fundamental Law effective from 1 January 2012 has significantly modified the competencies of the Constitutional Court and the role of the different constitutional institutions in constitutional adjudication. Among several changes it introduced three types of constitutional complaints and abolished the former existing *actio popularis*. The system of *actio popularis* meant a legal possibility that anyone could turn to the Constitutional Court claiming that a law, legal provision or regulation is contrary to a constitutional provision. The petitioner could also request the annulment of that piece of law. Constitutional complaint, under the former jurisdiction, was to be lodged only in case of personal injury caused by the application of an unconstitutional norm.

The aim of the new constitutional complaint mechanisms was to protect against personal injuries caused by ordinary courts and provide a possibility for constitutional review also in cases where the

complainant cannot turn to ordinary court. Moreover, the Constitutional Court may supervise the constitutionality of legal provisions when they, applied in certain judicial cases, lead to an unconstitutional court decision. Besides, the new system encourages civil petitioners to turn to the ombudsman in order to initiate the ombudsman's procedure to question the constitutionality of a legal provision before the Constitutional Court. As a result of the introduction of the new types of constitutional complaint, ordinary courts must also show an elevated awareness to questions of constitutionality among the ordinary waves of legal adjudication with regard to the new control mechanism that easily sheds light on the deficiencies of fundamental rights' adjudication. Judicial referral as it existed formerly stayed in force, which means that judges in pending cases turn to the Constitutional Court in case they state that an applicable piece of law is unconstitutional [1].

1.1. Until the Fundamental Law has entered into force, approximately 1,600 actions were brought annually in the Constitutional Court within the framework of the abstract ex-post facto review of law (*actio popularis*) procedure [2], which had no standing requirement. The ordinary courts adjudicated violations of the rights of the individual, while the primary duty of the Constitutional Court was to review the constitutionality of laws and regulations. Even in the procedure of constitutional complaint or judicial referral, the Constitutional Court could only investigate the unconstitutionality of the challenged law or regulation, and this investigation did not have as a mandatory consequence the retroactive exclusion of the applicability of the unconstitutional law or regulation in the given case [3].

The essence of *actio popularis* is that it was not necessary that the petitioner had any interest in the success of the proceeding, meaning that it was not necessary for that person to be affected. For the most part, the countries establishing the opportunity for *actio popularis* come from the line of post-socialist nations. *Actio popularis* could be the most important tool of direct democracy in a transitional democracy [4]. In the peaceful and effective management of transitioning into a constitutional democracy, constitutional observations by citizens affecting legislative activity may have a significant role, and this form

of participation in exercising power may also greatly invigorate public sentiment and the sense of joint action. Thus, the introduction of *actio popularis* in Hungary also reflected a kind of philosophy of democracy.

As a consequence, instead of protecting rights while adjudicating specific cases, abstract constitutional review was the duty of the Constitutional Court [5]. The Constitution and the over 20 years of constitutional practice interpreting it demonstrated that the democratic protection of the rule of law was in the interest of all members of the society. This was the assumption behind the legal instrument adopted by Art. 32/A para. 4 of Act XX of 1949 (the Constitution), the so-called *actio popularis*.The vast majority of the Constitutional Court's work consisted of the adjudication of these *ex post facto* abstract constitutional reviews, which could have been initiated by anyone [6].

Over the course of the past 20 years, in spite of the inherent values, *actio popularis* had become one of the most disputed elements in Hungarian Constitutional Court practice; one of the reasons for this was — as suggested by even the president of the Constitutional Court — the unbearable workload, inhibiting the adjudication of the cases within a reasonable period of time. Although *actio popularis* is not a shared European minimum requirement in the area of reviewing the constitutionality of laws and regulations, the Venice Commission of the Council of Europe stated that in Hungary the *actio popularis* was indeed able to filter out unconstitutional laws and regulations adopted prior to the effective date of the Constitution, during the years immediately following the political transition [7].

1.2. The Fundamental Law, however, introduced another form of protecting constitutionality; it eliminated the *actio popularis*, and enabled the bringing of an action on the basis of individual standing within the framework of a constitutional complaint, not only concerning unconstitutional decisions deriving from the application of an unconstitutional law or regulation, but also versus decisions or proceedings of ordinary courts violating the constitutional rights of the petitioners [8]. In Hungarian legal literature, *actio popularis* has often been presented as contrary to the proceeding initiated in the form of a constitutional complaint [9]. The basis of the comparison was that in

the case of *actio popularis* there are no admissibility/standing criteria for the review of constitutionality; while in the case of a constitutional complaint the institutions conducting the review always expect that the initiating party be somehow involved in the case. In the case of the constitutional complaint, the primary objective of the complainants is to obtain legal remedy for their own case, reaching the improvement of their own personal or financial position. The result of the proceeding can be the annulment of the unconstitutional law, just as in the case of the *actio popularis* based on abstract review of the law; however, the annulment of the unconstitutional law from the perspective of the complainant is merely a tool to obtain legal redress in his/her/its own case. To the contrary, in *actio popularis* the service of public interest, not the service of private interest forms the backdrop.

Although the two scopes of review can be contrasted from this perspective, the *actio popularis* and the constitutional law complaint are still not alternatives to each other; doctrinally, there is no obstacle to employing them side-by-side. In spite of this fact, in jurisprudence, the two legal institutions do not operate simultaneously in any national legal system. One partial reason for this is the workload limit of the authorities conducting the constitutionality review. A constitutional complaint with a broad scope and *actio popularis* can not be employed in most countries without expensive structural expansions and operational reforms in such a way that the cases could be resolved within a reasonable length of time.

Contrary to *actio popularis* — the essence of which is that the Constitutional Court accepts a motion as long as the petitioner indicates which law or regulation is deemed unconstitutional and explains intelligently why — the substantive element of the constitutional law complaint is to set up the system of admissibility criteria, the essence of which is that a law can be annuled only when its application in a specific case has led to a specific violation of a fundamental right [10]. The admissibility criteria help that *actio popularis* and constitutional complaints, aiming at another instance of personal remedy by the annulment of a legal provision, could be separated. Thus in Hungary from 2012 January, one can only request the abolition of an unconstitutional

law in the framework of a constitutional law complaint, if the merit of the complainant's case in front of the ordinary court is significantly affected by the challenged law. Constitutional complaints can only be initiated in case of violation of the rights and freedoms of the complainant, while the *actio popularis* proceeding was open for anybody if the legal provision violated any constitutional provision.

The constitutional complaint and the *actio popularis* may work with similar effectiveness regarding the filtering out of unconstitutional laws and regulations in the legal system. However, while the constitutional complaint, as a strong point, is able to redress individual violations of rights as well, it was a unique characteristic, a strong point of *actio popularis* that the petitioner there acted in the interest of (maintaining) constitutional democracy. In Hungary *the actio popularis* as a legal institution relied on the participation of people taking action in the interest of the public. This phenomenon of direct democracy ceased to exist in the Hungarian law.

1.3. Pursuant to Section 24 para 2 (c) of the Fundamental Law, on the basis of a constitutional complaint, the Constitutional Court reviews the compliance of the law or regulation applied in the given case with the Fundamental Law (old type and direct constitutional complaint). Pursuant to Section 24 para 2 (d) of the Fundamental Law, on the basis of the constitutional complaint, the Constitutional Court also reviews the compliance of the court decision with the Fundamental Law (new type, real or genuine constitutional complaint). By unfolding the rules contained in the Fundamental Law, the new Act on the Constitutional Court (ConstCourt Act) [11] established three categories of constitutional complaints.

The so called «*old type*» *complaint* Pursuant to Section 26 para 1 of the ConstCourt Act according to Section 24 para 2 (c) of the Fundamental Law, a person or organisation affected in an individual case may turn to the Constitutional Court with a constitutional complaint, as long as, over the course of the application of an unconstitutional law in the court proceeding conducted in the matter, a violation of his/her/its rights has occured and he/she/it had already exhausted available legal remedies or

legal redress as such is not available. This is what practitioners usually call «the old type» or «Section 26. para 1» constitutional complaint.

The so called *«direct» complaint* Pursuant to Section 26 para 2 of the ConstCourt Act, unlike in Para (1), as an exception, the proceeding of the Constitutional Court can be initiated when -by virtue of the application or effect of the unconstitutional provision — the violation of the filing party's rights had occurred directly, without a court decision, and no legal remedy is available to redress the unconstitutional situation, or the petitioners had already exhausted their legal remedies. This is what practitioners call a «direct» or «Section 26 para 2» constitutional complaint.

The so called *«real» or «genuine» complaint* Pursuant to Section 27 of the ConstCourt Act, according to Section 24 para 2 (d) of the Fundamental Law, the affected person or organisation in a given case can turn to the Constitutional Court against a court decision that is contrary to the Fundamental Law, if the final case decision made regarding the merits or other decision finally terminating a court proceeding violates the rights of the complainants enshrined in the Fundamental Law and the petitioners had already exhausted their legal remedies or no legal remedies had been made available. This is what practitioners call a «real», «genuine»or «Section 27.» constitutional complaint.

This type of constitutional complaint is well known from German law and has been a desired legal institution by many for a long time in Hungary [12]. Its practice — the activity of the Bundesverfassungsgericht of reviewing the decisions of ordinary courts from a constitutionality perspective — certainly eases the development of uniform standards of constitutionality to be applied by the courts.The institution of the real constitutional complaint seemed to be of crucial importance because it created an opportunity for the Constitutional Court to monitor the activity of ordinaty courts besides monitoring the activity of the legislator. The review is conducted from a constitutional perspective; the Constitutional Court has to adjudicate whether the interpretation of e.g. civil law, administrative law or criminal law complied with the Fundamental Law.

2. Post-communist constitutional development is far from complete. Hungary as well face constantly emerging old and new problems, one of which is — quite a new one — how fundamental rights apply in private relations and how constitutionality could be enforced in private matters by constitutional adjudication? The introduction of the above mentioned new types of constitutional complaint caused great turbulence concerning this nowadays highly relevant subject-matter of the European constitutional law.

2.1. The problem of the application of constitutional rights in private matters arises in many modern democracies. What does constitutionalism in the contemporary word command for the assessment of private relations? How are constitutional rules binding if they are binding at all in certain private relations?

We learn from the American concept of „state action» where fundamental rights apply primarily in the relation of the state and the individual, but in the jurisprudence more and more situations amount to be situated in the constitutional sphere [13]. We learn from the German concept of third party effect, the Drittwirkung, that stands on the idea that private law has to be interpreted in the light of the Basic Law. This means that judges cannot refer directly to the Basic Law, to put is simply, the Basic Law is only an interpretative tool to other legal provisions in the hand of the ordinary judge [14]. We also learn for the idea of direct horizontal effect of consitutional rights that works in Poland or in Ireland for example [15]. These jurisprudences allow judges to apply constitutional right as the only legal basis of their decisions.

The eternal question underneath the universality of constitutionalism is whether the classical models, solutions of western democracy can indeed be adopted to other regions of the world and if yes, what way and to what extent. My answer to this question is that there must be a core and a penumbra (center and periphery) of the idea of constitutionalism as a legal concept. I find that the core is definitely universal which means that there could be different interpretations of Chopin's notes, but the essence must stay inviolable in a good interpretation. Concerning the penumbra there can be bigger differences between national concepts, solutions. Constitutional processes — in Hungary

and in Russia as well — must definitely be placed in the worldwide transitional process from authoratarianism to constitutional democracy.

This means for example — applied to the question of the application of constitutional rights in private matters — that it certainly belongs to the core of the idea of the protection of fundamental rights that constitutional rights apply and must be protected by the state in private matters as well. The question is how and what far is it possible and what could be the role of constitutional adjudication?

It is evident that states can always implement rules in order to protect defenseless individuals from the derogatory conduct the state and also of other private entities and individuals. The legislation must comply with the so far best developed and universally accepted standard of proportionality. Private law provisions and the fairly new anti-discrimination legislations worldwide bring good examples for this.

As the state has this regulatory power, in most of the cases brought to the courts, it is not necessary to invoke one's fundamental rights granted by the constitution; in ordinary legal debates, it is enough to call for a statutory provision when seeking legal protection. This is why the application of constitutional rights in private disputes is a «residual category», which means that the application of constitutional rights occurs only if ordinary legislation fails to protect fundamental rights.

But what are the requirements of this „horizontal» application, what amounts to be the „constitutional interpretation of the law» and who decides on these requirements? Due to the introduction of the new constitutional complaint mechanisms, Hungary nowadays is right on the track to give answers to this dilemma. This „obscure phenomenon» was always on the horizon of Hungarian constitutional law, but got central attention with the introduction of the new constitutional complaint mechanisms, the change in constitutional adjudication as discussed above. With the introduction of the possibility of the supervision of the decisions of ordinary courts from the perspective of constitutionality, the Constitutional Court got new competences in the supervision of the enforcement of fundamental rights in private matters as well.

The new Civil Code adopted in March 2013 mentions that civil law must be interpreted in conformity with the Fundamental Law. All this in

mind, ordinary judges have to decide on how and to what extent constitutional rights apply to private relations, if they could be referred to as the individual legal basis of a decision or they are necessary interpretative tools, and ultimately it is up to the Constitutional Court to supervise upon a petition, on a case-by- case basis, whether or not the position of the court was in conformity with the Fundamental Law. This is a way a solution of a conflict and later a judicial practice could be born in case there is a respect for cooperative constitutionalism.

2.2. The development of constitutional democracy following the political transition in 1989 was effectively assisted by the legal institution of *actio popularis.* Hungary could be an example for how constitutional protection operates smoothly as a result of the mostly public-interest driven action of natural and legal persons. *Actio popularis* ceased to exist. The new system of the German type constitutional complaint mechanisms enable the monitoring of the constitutionality of court decisions simultaneously with the constitutional review of laws and regulations.

The idea, that it is not only the legislative acts but also the court proceedings, including certain questions of interpretation, can be supervised by the Constitutional Court from the perspective of constitutionality, may serve the application of fundamental rights in private matters as well, a core question of the protection of fundamental rights.

However, since January 2012, only one single case ended with the annulment of a court decision by the Constitutional Court under this new competence. The case was not based on a private law debate, although the greatest part of the petitions are of this kind [16]. The decision was born in March 2013 and concerned a matter of the right to demonstration. The Constitutional Court stated that ordinary court hindered the demonstration with its unlawful procedure [17]. As to the question of the application of fundamental rights in private matters what we already know is cases when a problem of the petitioner do not amount to be a constitutional rights problem according to the Constitutional Court [18].

The Fundamental Law — besides all the well founded critics — has made a great step towards the enforcement of the constitutional

rights also in private matters with opening up the possibility for constitutional complaint against a court decision. This pressure on ordinary courts cannot be bad for the purposes of constitutionality, even if it stays primarily — further on — the task of ordinary court to find the proper balance between the enforcement of the purposes of the Civil Code and the Fundamental Law.

Примечания

1. See more about this issue in English in Fruzsina Gárdos-Orosz: Citizens' Rights to Constitutional Adjudication in Hungary / *Smuk P.* (ed.) Changes in the legal system of Hungary. Budapest, Complex, 2013. Forthcoming and in Fruzsina Gárdos-Orosz: The Hungarian constitutional court in transition — from actio popularis to constitutional complaint. Acta juridical Hungarica, 2012. P. 302–315.

2. URL: www.mkab.hu/letöltések/evkonyv.

3. About competencies of the Constitutional Court under the Act XXXII. of 1989 on the Constitutional Court (former ConstCourt Act) and about changes brought upon by the new Fundamental Law see in a nutshell. The Constitutional Court / *Csink, Lóránt.–Schanda, Balázs.–Varga, Zs. András* (eds.). The Basic Law of Hungary: A First Commentary Clarus Press, Dublin. 2012. P. 157–167.

4. *Sólyom L.* The role of constitutional courts in the transition to democracy–with special reference to Hungary / *Said Amir A.* (ed.). Constitutionalism and political reconstruction. State University of New York, Stony Brill, Leiden, The Netherlands. 2007. P. 312.

5. *Halmai, Gábor.–Tóth, Gábor. Attila* (eds.) *Emberi Jogok* [Human Rights]. Budapest, Osiris. 2005. P. 215–216.

6. Art. 1. para b) of the former ConstCourt Act. Even the majority of the most significant decisions of the Constitutional Court were carried out under this procedure, such as the abolition of death penalty (Decision 23/1990. CC) or the decision on the official use of personal identification number (Decision 15/1991. CC).

7. Opinion no. 614/2011. of the European Commission for Democracy through Law (Venice Commission) on three legal questions arising in the process of drafting the new Constitution of Hungary.

8. In order to ensure a fair transition between the *actio popularis* and the new system of constitutional complaints, during the first quarter of 2012, pursuant to the Act CLI of 2011 on the Constitutional Court. URL: http://mkab.hu/

rules/act-on-the-cc. (ConstCourt Act), those *actio popularis* motions could be submitted as constitutional complaints whose contents were originally targeted at the ex-post facto review of the constitutionality of a law or regulation and were proposed by a person who would also have standing to do so under the Fundamental Law.

9. *Uitz R.* E.g. May Less be More? Public Interest Standing and the Protection of Constitutional RightsLessons from Hungary's Actio Popularis / *Pasquino, Pasqual.–Randazzo B.* (eds.) La giustizia constituzionale ed i suoi utenti, Publicazioni dell'Institutio di Diritto Publico. Milan, Giuffrè, 2006. № 57. P. 89–117.

10. *Sadurski W.* Rights before courts: A Study of constitutional courts in post-communist states of Central and Eastern Europe, Spingler, The Netherlands 2005. P. 7.

11. Act CLI. of 2011. on the Constitutional Court.

12. *Halmai G.* E.g. The Third Party Effect in Hungarian Constitutional Adjudication // *Sajó A., Uitz R.* (eds.) The Constitution in Private Relations. Expanding Constitutionalism. Eleven International Publishing, The Netherlands. 2005.

13. *Tushnet M.* The relationship between judicial review of legislation and the interpretation of non-constitutional law, with reference to third party effect / The constitution in private relations: expanding constitutionalism / A. Sajó, R. Uitz (eds.), 2005. 169.

14. *Donald P.* Kommers. The Constitutional Jurisprudence of the Federal Republic of Germany. 1989. P. 368.

15. *Kühn Z.* Making Constitutionalism Horizontal: Three Different Central European Strategies / The constitution in private relations supra note. P. 231–235.

16. URL: www.alkotmanybirosag.hu

17. Decision III/2013 (II. 14.) CC.

18. Decision 7/2013 (III. 1.) CC ; Decision 8/2013. (III. 1.) CC ; Decision 3120/2012 (VII. 26.) CC.